THE HON'BLE SRI JUSTICE GODA RAGHURAM
AND
THE HON'BLE SRI JUSTICE N.RAVI SHANKAR

APPEAL SUIT No.19 of 1995

JUDGMENT: **(Per THE HON'BLE SRI JUSTICE N. RAVI SHANKAR)**

Heard Sri Sharad Sanghi, learned counsel for the appellants and Sri Pratap Narayan Sanghi, learned counsel for the respondents.

2. The original appellant Sivaprasad Dhoot who is said to be the proprietor of Sivasakthi Transport of Adilabad is the defendant in O.S.No.30 of 1992 on the file of the Court of District Judge, Adilabad (trial court). The said suit was decreed with costs by the trial court on 26.09.1994 for a sum of Rs.3,35,445-40 ps with future interest at 18% per annum on the sum of Rs.3,06,639-32 ps from the date of the suit till realization. Questioning the same this appeal has been filed. Pending the appeal, the original appellant died and thereafter his wife and sons came on record as appellants 2 to 5 as his legal representatives.

3. The matter pertains to a claim for compensation for the value of the goods entrusted to the appellant for transport and which are said to have been lost in transit. For convenience, the parties shall hereafter be referred as they are arrayed in the suit.

4. The defendant admittedly was the proprietor of Sivasakthi Transport and the plaintiff says that he was a common carrier within the meaning of the Carriers Act, 1865 (for short Act). The plaintiff's version is that on 28.01.1992 he entrusted to the defendant 50 bales of cotton more fully described in Ex.A.2 despatch advice worth Rs.3,06,639-32 ps at Adilabad to be

delivered to the consignee M/s.Crystal Spinners of Udmalpet in Tamilnadu. The freight charges are stated to be Rs.10,000/- out of which the plaintiff paid Rs.3,000/-. The defendant despatched the same to the destination through lorry No.TAX 1733. However, the goods did not reach the destination and the plaintiff informed the same to the defendant on 17.02.1992. In spite of several requests from the plaintiff the defendant failed to deliver the goods to the consignee and the goods were not traced.

5. The plea of the plaintiff is that the defendant being a common carrier is solely responsible for the loss of goods and therefore he is entitled to recover the same from him. The plaintiff valued the goods/loss at Rs.3,06,639-32 ps. He has also referred to the notices and the replies given by the defendant. The plaintiff therefore claims Rs.3,06,639-32 ps plus the advance freight charges of Rs.3,000/- together with interest at 18% per annum from 28.01.1992 till payment.

6. The defendant in his written statement denied that he is a carrier. His version is that the plaintiff himself contacted the driver of the aforesaid lorry and arranged for the transport by settling the freight charges at Rs.10,000/- and paid Rs.3,000/- as advance to the lorry driver. His further plea is that he merely acted as a broker in arranging the lorry and took only an amount of Rs.200/- towards brokerage in arranging the lorry and that therefore is not responsible for the loss of goods. His further version is that after learning about the loss of goods from the plaintiff he gave a report to the police and it was registered as Crime No.34/1992 in Adilabad Town Police Station and the matter was under investigation and what happened to the goods has to be ascertained and the plaintiff filed the suit in haste. The further version of the defendant is that the lorry owner Mr.N.Rajagopal of

Tiruchirapalli and the lorry driver Mr. T.Nagarajan of the same place are necessary parties and the suit is also bad for their non-joinder.

7. The trial court considered the evidence of P.W.1 Aswin Kumar who is the special power of attorney holder of the plaintiff (consignor) of the cotton bales in question; the evidence of D.W.1 Sivaprasad Dhoot himself who is the proprietor of the defendant concern; Ex.A.3 receipt (lorry receipt) which was issued in the name of Sivasakthi Transport of D.W.1 and accepted the case of the plaintiff. It rejected that D.W.1 was a mere broker. It then considered the question of non-joinder of the lorry owner and the driver and held that there was no privity of contract between the plaintiff and the lorry driver or its owner and concluded that the defendant was a carrier and liable for the claim as the goods were lost. These findings are questioned by the learned counsel for the appellants who are the legal representatives of the original defendant as contrary to evidence.

8. We have gone through the evidence of P.W.1 and D.W.1, Exs.A.1 to A.11 documents filed by the plaintiff and are of the opinion that there is no ground to disturb the above findings of the trial court for the following reasons.

9. On the first point as to whether there is entrustment of goods to the defendant by the plaintiff, it may be noted that Ex.A.3 lorry receipt which is admitted by D.W.1 would show that his concern i.e. Sivasakthi Transport received the consignment and it reads that the total freight charges were fixed at Rs.10,000/- for 50 bales i.e. Rs.200/- per bale, and further he received Rs.3,000/- towards advance and Rs.7000/- was still due. Nothing has been elicited from the cross-examination of D.W.1 to disbelieve Ex.A.3. Further

nothing is also elicited from the cross-examination of P.W.1 to hold that the plaintiff directly entrusted the goods to the driver of the aforesaid lorry and D.W.1 merely acted as a broker. Ex.A.3 clearly shows that it was issued by Sivasakthi Transport which is the concern of the original defendant i.e. D.W.1. Thus D.W.1 has to be treated as the carrier within the meaning of the Act.

10. So far as the question relating to loss of goods is concerned, the evidence of D.W.1 himself would show that they were not delivered to the consignee and there is no explanation from him as to what happened to the goods. The goods are cotton bales and do not fall under the schedule to the Act. It therefore follows that the defendant cannot escape liability or restrict his liability in any manner by relying upon Section 3 of the Act. Thus as held by the trial court the defendant being a common carrier would become liable for the loss of the goods. The matter however does not end here.

11. It may be noted that a consignor, to recover the amount claimed by him towards value of goods entrusted to a carrier, should not only prove entrustment of goods and their loss but has also to prove that the goods entrusted are of the value claimed by him. We will now take up this requirement of proof regarding value as the third question.

12. In the plaint the plaintiff has in para-5 thereof clearly stated that the value of the cotton bales in question is Rs.3,06,639-32 ps and claimed that the defendant having undertaken to transport the same to the consignee is liable for the loss of the said cotton bales/goods as he failed to deliver the same to the consignee or to the plaintiff. He also claimed Rs.3,000/- paid to the defendant towards part of the freight charges. The defendant, it should be

noted, while answering the averments in para-5 of the plaint nowhere specifically denied the plaintiff's claim that the value of the cotton bales was Rs.3,06,639-32 ps. He merely reiterated his defence that he is not a carrier, he gave police report and the suit was filed in haste. We have already rejected his plea in that behalf. In fact in the entire written statement there is no specific denial by the defendant about the value of the cotton bales mentioned and claimed by the plaintiff.

13. It should also be noted that prior to filing of the suit the plaintiff got issued the original of Ex.A.6 notice to the defendant wherein also he specifically mentioned and claimed that the value of the cotton bales was Rs.3,06,639-32 ps. The defendant got issued Ex.A.8 reply dated 12.05.1992. Even in that reply the defendant only took the plea that he was not the carrier but acted as only a broker. He did not deny the value of the goods. The defendant Sivaprasad as D.W.1 in his evidence also did not deny the value of the cotton bales. Even the cross-examination of P.W.1 would show that the defendant's counsel in the trial court did not question P.W.1 about the value of the goods. We have mentioned the above circumstances, apart from the averments in the written statement, only to show how the defendant conducted his defence.

14. It may now be noted that a combined reading of Rules 3, 4 and 5 of Order VIII of the Code of Civil Procedure, 1908 (for short Code), would show that the defendant has to specifically deny each and every allegation made in the plaint and a mere evasive denial is not enough and in such a situation the allegations or the case set out in the plaint must be deemed to have been admitted. It is of-course true that Rule 3 of Order VIII of the Code regarding specific denial creates an exception with regard to damages. The

plaintiff did not make any claim for damages here, but he claimed the value of the goods i.e. cotton bales which were lost in transit and which were not traced. In such a situation the above exception cannot come to the rescue of the defendant. In the circumstances the defendant must be deemed to have admitted the plaintiff's claim regarding the value of the goods.

15. From his side, the plaintiff examined P.W.1 about the value of the goods and filed Ex.A.2 copy of the invoice despatched to the consignee, which also shows that the value of the cotton bales is Rs.3,06,639-32 ps. Normally this evidence let in by the plaintiff may not be held to be sufficient to uphold the case of the plaintiff as may be treated as self-serving testimony but that aspect will assume importance only if there is a specific denial by the defendant regarding the value of the goods which is not the case here.

16. It may however be noted that the proviso to sub-rule 1 of Rule 5 of Order VIII of the Code reads that a discretion is given to the court to require any facts to be proved by the opposite party even if it is admitted. It is true that this discretion is conferred upon the court, but in the face of the above written statement of the defendant, the failure of the defendant to deny the value of the goods even in his Ex.A.8 reply and his failure to cross-examine P.W.1 to show that the value of the goods will not be equal to the amount claimed by the plaintiff, we are of the opinion that this court need not exercise the above discretion and call upon the plaintiff to prove the value of the goods independently ignoring the above circumstances which weigh against the defendant. Accordingly, we answer the question relating to the value of the goods also in favour of the plaintiff.

17. Even with regard to the plaintiff's claim for Rs.3,000/- paid towards advance freight charges out of Rs.10,000/-, Ex.A.3 lorry receipt shows that the defendant did receive Rs.3,000/- as advance freight charges. There is no reason to reject this claim of the plaintiff. We accordingly hold that plaintiff is entitled to refund of this amount of Rs.3,000/- also for the aforesaid reasons.

18. That takes us to the question of interest. The plaintiff claimed interest at the rate of 18% per annum on the amount of Rs.3,06,639-32 ps (value of the goods and advance freight charges) from 28.01.1992 i.e. the date of entrustment of consignment to the defendant. The trial court granted 18% interest on the sum of Rs.3,06,639-32 ps from the date of the suit. This rate of interest i.e. 18% per annum, having regard to the transaction in the case which can be said to be a commercial transaction, cannot be said to be unreasonable especially when it is granted from the date of the suit.

19. Regarding the liability of the appellants for the suit claim, it should be noted that the present appellants are the legal representatives of the deceased defendant. Nothing has been brought to our notice to hold that they would be personally liable for the suit claim.

20. For the aforesaid reasons, we are of the opinion that this appeal must fail and it is accordingly dismissed with costs holding the appellants liable to the suit claim only to the extent of the property of the deceased which has come to their hands and has not been duly disposed of. Any amount paid by the original defendant or appellants shall be given credit to and adjusted against the suit claim. All the civil miscellaneous petitions in the appeal shall stand disposed of according to the result of this

appeal.

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GODA RAGHURAM, J

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N. RAVI SHANKAR, J

25th JUNE 2012

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